***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

641

# BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 22,946

MARGARET WENT,

Appellant,

v.

MARRIOTT HOT SHOPPES, INC., et al,

Appellees

Appeal from the United States District
Court for the District of Columbia

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# INDEX



## TABLE OF CASES

Page



OTHER AUTHORITIES

## STATEMENT OF QUESTIONS PRESENTED

1. Did the lower court abuse its discretion in not permitting Plaintiff-Appellant to use two additional witnesses who were not originally named on Plaintiff-Appellant's witness list?
2. Did the lower court err in refusing to grant Plaintiff-Appellant's Motion for Voluntary Non-Suit?
3. Did the lower court abuse its discretion in dismissing this case for want of prosecution?

This case has never been before the United States Court of Appeals for the District of Columbia with this or any other title.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

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No. 22,946

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MARGARET KENT,

Appellant

v.

MARRIOTT HOT SHOPPES, INC., et al,

Appellees

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Appeal from the United States District
Court for the District of Columbia

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# BRIEF FOR APPELLANT

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## JURISDICTIONAL STATEMENT

The jurisdiction of this Court is based upon the Act of October 31, 1951, 35 Stat. 726, as amended, 28 U.S. Code, § 1291.

REFERENCE TO RULINGS - Order of Judge Keech, Filed February 7, 1969

STATEMENT OF CASE

On March 10, 1966, at approximately 6:45 A.M. the Appellant, prior to going to work, went to the Hot Shoppes at 4110 Wisconsin Avenue, N.W., Washington, D.C. for some coffee. At the point where the sidewalk, under the control of Appellee, Marriott Hot Shoppes, Inc., connects with the sidewalk under the control of Appellee, District of Columbia, the Appellant was caused to fall by pebbles lying on the sidewalk. As a result of this fall, the Appellant suffered severe personal injury.

On November 27, 1968, a pretrial hearing was held in this matter. Under the title "Further Stipulations" in the report of the pre-trial examiner, was the agreement between the parties to file with the Clerk of the Court and to mutually exchange, on or before December 14, 1968, a list of the names and addresses of any witnesses known to them, other than those already listed. On or before December 14, 1968, the Appellant did file with the Court a pleading entitled "Plaintiff's Information in Compliance with Pre-Trial Order," which set forth witnesses known to the Appellant at that time and incorporating by reference all witnesses set forth in the pre-trial statements of the Appellees. Similarly, a "List of Witnesses" was submitted by the

Defendant, District of Columbia. Among the witnesses, named by the District of Columbia, and incorporated by reference into Appellant's pre-trial witness list, were Robert S. Durbin, Manager, Hot Shoppes Restaurant, 4110 Wisconsin Avenue, N.W., Washington, D.C., and a representative of the Department of Highways and Traffic for the District of Columbia.

Prior to the trial of this matter, it came to the attention of Counsel for Appellant, after lengthy investigation, that the former manager of the Hot Shoppes Restaurant, Robert S. Durbin, listed in Appellee's, District of Columbia, "List of Witnesses" and incorporated by reference in Appellant's Statement in Compliance with Pre-Trial Order, was out of town and could not be reached by mail or by telephone. Thereupon, Counsel for the Appellant and his staff endeavored to find a replacement for witness Durbin. On January 31, 1969, the name of one, William Edwards, was brought to the attention of Counsel for the Appellant. Mr. Edwards was employed by the Appellee, Marriott Hot Shoppes, Inc., at its home office at River Road, Washington, D.C. Notice that this witness was served upon the Appellees on January 31, 1969.

On February 4, 1969, the scheduled date for trial, Counsel for Appellant, in response to inquiry from the

Court as to whether or not there were any preliminary matters, stated that on January 31, 1968 his office served a notice upon the Defendants-Appellees informing them of two witnesses and a police regulation of the District of Columbia. This was objected to by Appellee, Marriott Hot Shoppes, Inc., whereupon the Court rules that Counsel for the Appellant could not use witness Edwards from Defendant-Appellee, Marriott Hot Shoppes, Inc., in the trial of this matter. The Court further ruled that the second witness, a Mr. Kessler from the Department of Highways and Traffic of the District of Columbia, could only be used to the purposes of defining the boundary of the property in question. Counsel for Appellant then moved for a voluntary non-suit of the case. Counsel for Appellee, Marriott Hot Shoppes, Inc., at this time, requested that the case be dismissed with prejudice. The Court thereupon dismissed with prejudice Appellant's case for want of prosecution.

Appellant duly noted an appeal to this Court from the trial court's ruling and order denying the motion of the Plaintiff to dismiss this action without prejudice and ordering that the motion of Defendants, Marriott Hot Shoppes, Inc., and the District of Columbia, to dismiss the action with prejudice for failure to prosecute be granted.

## STATEMENT OF POINTS

1. The Lower Court abused its discretion in not permitting Plaintiff-Appellant to use two additional witnesses who were not originally named on Plaintiff-Appellant's witness list.

2. The Lower Court erred in refusing to grant Plaintiff-Appellant's Motion for a voluntary non-suit

3. The Lower Court abused its discretion in dismissing this case for want of prosecution.

## ARGUMENT

### I.

### THE LOWER COURT ABUSED ITS DISCRETION IN NOT PERMITTING PLAINTIFF-APPELLANT TO USE TWO ADDITIONAL WITNESSES THAT WERE NOT ORIGINALLY NAMED ON HER WITNESS LIST.

At the hearing of this matter of February 4, 1969, the trial court initially refused to permit two of Appellant's witnesses to testify. These two witnesses were Mr. David Kessler of the District of Columbia Department of Traffic and Highways and Mr. William Edwards. Mr. Edwards, an employee of the Appellee, Marriott Hot Shoppes, Inc., was called upon by the Appellant after the Appellant discovered that the witness originally named by the Appellee, District of Columbia, Robert S. Durbin, whose name was incorporated

by reference in Plaintiff-Appellant's list of witnesses, was going to be out of town and could not testify in this matter. Mr. Edwards, like Mr. Durbin, would have been used to discuss the maintenance work at the Hot Shoppes on Wisconsin Avenue, which was the place of injury to the Appellant. Mr. Edwards was in charge of the maintenance at all the Hot Shoppes in the Washington Metropolitan Area. While Mr. Edwards and Mr. Durbin did not have the same exact positions of employment with the Appellee, Marriott Hot Shoppes, Inc., the scope of their testimony would have been the same in that the Appellant was merely attempting to bring out, in search of the truth, the condition created by pebbles under the control of Marriott Hot Shoppes, Inc. Similarly, the witness Kessler, who had been named by Appellee, District of Columbia, and incorporated by reference by the Appellant, was to be called by the Appellant to testify as to the general knowledge that pebbles are a hazardous condition. Such testimony was rejected by the trial court and the scope of Mr. Kessler's testimony was restricted to that of the boundaries of the property. In that Plaintiff-Appellant's Pre-Trial Statement did, in fact, allege that a hazardous condition was created by these pebbles, such testimony would not have been beyond the scope of the issues delineated at the pre-trial of this matter.

The substitution of witness Edwards for witness Durbin in no way could prejudice or surprise Appellees. Rule 16(6) provides that when sone vital matter is discovered after pre-trial and before trial, that the order may be amended to avoid manifest injustice. McCarthy v. Lerner Stores Corp., 9 F.R.D. 31 (D.D.C. 1949).

As the substitution of two witnesses who would testify to essentially the same matter as those for whom they were substituted would not in any way defeat the primary purpose of the pre-trial precedure, nor surprise Appellees, it was an abuse of discretion for the trial judge to refuse Appellant the testimony of these witnesses. "The fact that the parties at the beginning of the trial had stipulated to facts contrary to the proposed amendment should not be a bar to allowance of one amendment if the circumstances were such that the moving party should not be bound by the stipulation." Maryland Casualty Co., v. Rickenbacker, 3 Fed. Rul. Serv. 15a.21 (4th Cir. 1944).

## ARGUMENT II

## THE LOWER CCURT ERRED IN FAILING TO GRANT PLAINTIFF-APPELLANT'S MCTION FOR VOLUNTARY NON-SUIT

It is the general rule of law that the Plaintiff may elect to take a non-suit or non pros of his case at any state of it before verdict rendered, subject to payment of

Defendant's costs. Bradshaw v. Earnshaw, 11 App. D.C. 495. In using the phrase "voluntary dismissal" courts use the discriptive word "right" rather than "privilege" in that the right of voluntary dismissal is a vital policy of Federal Procedure and it is one of the consequences to which all federal cases are subject whether they be originally filed in Federal Court or moved thereto. Colverhaus v. Biehl and Company, 24 F.R.D. 198 (D.C. Tex. 1959). Furthermore, it has been a basic theory of law that the Plaintiff generally has a right to a voluntary dismissal, upon payment of Defendant's costs, unless it appears that the Defendant would suffer from plain legal prejudice other than mere prospect of a second law suit. Hamer v. Chilton, 37 F.R.D. 542 (D.C. S.C. 1965).

In the case under discussion, Counsel for the Appellant moved the lower court to permit the Appellant to non-suit or voluntary dismissal of Appellant's case without prejudice due to the fact that the trial court has refused to allow Appellant's witnesses to testify as to matters of extreme importance and relevance to Appellant's case. Although the lower court never actually ruled upon Appellant's Motion, at the hearing of this matter on February 4, 1969, the lower court did grant Appellees' motion for dismissal with prejudice. At no time did the lower court inquire as

to the legal prejudice that would result from such a voluntary non-suit without prejudice nor did the lower court make any inquiries into the prejudice to the Appellees which might result from Appellant's motion. It has been said that the mere possibility that the Defendant might be harrassed by another action directed to the same object is not enough to deny the Plaintiff the right to dismiss, since an ordinary inconvenience of double litigation is not a legal prejudice, and can be compensated by cost. Pullman's Palace Car Company v. Central Transportation Company, 171 U.S. 138, 43 L.Ed. 108, 18 S.Ct. 808, 24 Am Jur 2d, ("Dismissal, Discontinuance and Non Suit" Sec. 9 at page 11.)

Appellant, being willing to proceed if allowed to substitute witnesses, had no recourse but to request a non-suit when it appeared that prosecution of the suit was made impossible by the court's refusal to allow the use of key witnesses. The lower court should have granted Appellant's motion for voluntary non-suit. The essential question is whether the dismissal will be unduly prejudicial to the Defendant. Harvey Aluminum, Inc. v. American Cyanamid Co., D.C.N.Y. 15 F.R.D. 14, In this case the only prejudice to Appellees would be the prospect of a second law suit, a prejudice which is cured by payment of Appellees' costs.

## ARGUMENT III

## THE LOWER COURT ABUSED ITS DISCRETION IN DISMISSING THIS CASE FOR WANT OF PROSECUTION

The Appellant does not contend that the question of whether or not to grant a motion to dismiss is within the discretion of the trial court. It is the contention of the Appellant, however, that the trial court in the matter under discussion did, in fact, abuse its discretion in dismissing Appellant's case for lack of diligent prosecution. It has been held that a motion to dismiss for want of prosecution should not be granted if at the time of the motion, the Plaintiff is diligently prosecuting his claim, even though at some prior period of time he had been guilty of gross negligence or neglect. Ayres v. D.F. Crillin & Sons, Inc., 188 A.2d 510, 24 Am Jur 2d, "Dismissal, Discontinuance, and Non Suit," Sec. 6(b) at page 51. Furthermore, length of time alone is not a test of due diligence in prosecuting a pending action; the question must be determined by all the facts and circumstances of each case. Chicago and Northwestern R.R. Co. v. Bradbury, 128 N.W. 2d 540, 24 Am Jur 2d "Dismissal, Discontinuance and Non Suit," Sec. 6(b) at page 51.

In the case under discussion, a motion to dismiss for want of prosecution was granted by the lower court due

to the fact that the Plaintiff-Appellant, attempting to exercise her right under the law, had requested the court to voluntarily non-suit the case. The court states at page 15 of the transcript of the hearing that it would be inequitable to reinstate this case when the statute of limitations is just about ready to run. It is respectfully submitted that this should not be the basis for a granting of a motion to dismiss for want of prosecution and that this was, in fact, the basis for the trial court's decision. It was the basis for preventing the Appellant from having her rightful day in court.

## CONCLUSION

In view of the foregoing arguments, Appellant prays this Court reverse and remand the instant action with directions to Vacate the Order Granting Defendants' Motion to Dismiss for Want of Prosecution and to grant the Appellant a new trial.

Respectfully submitted,

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# BRIEF FOR APPELLEE DISTRICT OF COLUMBIA

## UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 22,946

MARGARET WENIT,

Appellant,

v.

MARRIOTT HOT SHOPPES, INC., et al.,

Appellees.

Appeal From The United States District Court
For The District Of Columbia



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# I N D E X

Page

## SUBJECT INDEX



## CASES CITED

## RULE OF COURT CITED



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*Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

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Appeal From The United States District Court
For The District Of Columbia

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# BRIEF FOR APPELLEE DISTRICT OF COLUMBIA

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## COUNTER-STATEMENT OF ISSUE PRESENTED

Whether, upon plaintiff's refusal to proceed to trial following the trial court's ruling that she could not use certain evidence, which was not produced in accordance with the terms of the pretrial order, to support a new theory of liability against the co-defendant of the District of Columbia, the trial court erred in dismissing, with prejudice, the complaint against the District of Columbia.

This case has not been before the Court on any prior occasion.

## COUNTER-STATEMENT OF THE CASE

Subject to the following corrections, the District of Columbia agrees with and adopts the "Counterstatement of the Case" set forth by Marriott Hot Shoppes, Inc.:

1. The complaint does not allege that plaintiff "fell on pebbles laying on a public sidewalk maintained by defendant District of Columbia and adjacent to the entrance of one of defendant Hot Shoppes' restaurants," but alleges that she fell "* * * at or near the junction of the public sidewalk of the defendant, District of Columbia, and the sidewalk of the defendant, Hot Shoppes, Inc." (Complaint.)

2. Plaintiff's claim as set forth in the pretrial order is not that "the defendants negligently failed to detect and remove pebbles from the public sidewalk," but that Marriott Hot Shoppes, Inc., was negligent in "[m]aintaining sidewalk or walkways in a hazardous manner in that it permitted pebbles to lie upon said walkway," and that the District of Columbia was negligent in "[m]aintaining sidewalks in a hazardous manner in that it allowed pebbles to lie upon the walkway." (Pretrial Order.)

3. The statement that "the plaintiff filed a Motion to Supplement the Pretrial Order to include a claim that the alleged hazardous condition was created by defendant Hot Shoppe" is not entirely accurate. The

purpose sought to be accomplished by supplementing the pretrial order was to set forth a new theory of negligence against Marriott Hot Shoppes, Inc., by alleging that Marriott Hot Shoppes, Inc., placed " * * * pebbles in a hazardous manner such that pebbles were permitted to be disbursed upon and/or lie upon said walkway." (Motion of Plaintiff to Supplement Pretrial Order.)

## ARGUMENT

**Since the rejected evidence did not relate to plaintiff's claim against the District of Columbia, the District was entitled, upon plaintiff's failure to prosecute her claim, to a dismissal of the complaint with prejudice.**

For the purpose of this Argument, it is desired that the Court read (1) the complaint, (2) the Official Transcript of Proceedings dated February 4, 1969, and (3) the order of the district court entering judgment for defendants.

In addition to the reasons set forth in the brief of Marriott Hot Shoppes, Inc., the District of Columbia was entitled to the dismissal of the complaint with prejudice because the proffered evidence did not relate to any theory of liability formally or informally advanced against the District of Columbia, but to a new theory not set forth in the pleadings or pretrial order against Marriott Hot Shoppes, Inc. Consequently, whatever view may be taken regarding the propriety of the trial court's

refusal to allow plaintiff, at the eleventh hour, to present the proffered evidence to prove an unpleaded claim against Marriott Hot Shoppes, Inc., its ruling had no deterrent effect, whatsoever, on plaintiff's ability to proceed with her case against the District of Columbia.

According to the complaint and pretrial order, plaintiff was proceeding against the District on the theory that the District failed to discharge its duty of keeping the public sidewalk in a reasonably safe condition for pedestrian traffic. In order to recover, it would have been incumbent upon her to prove that she fell on a public sidewalk, that the sidewalk was in a dangerous condition, and that the District had actual or constructive notice of such condition. District of Columbia v. Woodbury, 136 U. S. 450, 463 (1890); District of Columbia v. Boswell, 6 App. D. C. 402, 418 (1895); Smith v. District of Columbia, 89 U. S. App. D. C. 7, 189 F. 2d 671 (1951); Harding v. District of Columbia, 178 A. 2d 920 (D. C. Mun. App., 1962).

Neither the police regulation nor the two additional witnesses were proffered to prove any of the above elements. The police regulation prohibits adjacent property owners, who do not have a permit to do so, from erecting structures or placing other objects on public

space.[1] Although the regulation may have been relevant to a determination of the liability of Marriott Hot Shoppes, Inc., to the plaintiff under the new theory of liability which the pretrial judge refused plaintiff leave to assert, and, although it may have been relevant to a determination of the liability of Marriott Hot Shoppes, Inc., to the District of Columbia for any losses suffered by the District as a result of injuries sustained by the plaintiff, it was not probative of any element of plaintiff's claim against the District of Columbia. Furthermore, it appears that counsel for plaintiff withdrew her proffer by stating to the trial judge "I am not really contesting the policy[2] [sic] regulations" (Tr. 11).

The proposed testimony of the two proffered witnesses falls into the same category as the regulation. Mr. Kessler was described as an employee of the District of Columbia Department of Highways and Traffic whose function it is to oversee the use of public parking spaces, i.e., the public space between the paved sidewalk and the building line.

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[1] The regulation is set forth as an addendum to this brief.

[2] The transcript of proceedings contains many typographical errors. The word obviously intended and probably used was "police" not "policy."

Counsel for the plaintiff stated that Mr. Kessler has "a double function" and that: "I was going to use him for violation of ordinance, but I was going to use him to establish the boundaries of the Hot Shoppe property"[3] (Tr. 11). The court ruled that he could testify relative to the latter purpose (Tr. 13-14). Again, testimony regarding the violation of the police regulation would not have been probative of any element of plaintiff's claim against the District of Columbia.

The plaintiff attempted to substitute Mr. Edwards, whose name was not supplied in accordance with the mandate of the pretrial order, for Mr. Durbin, whose name was supplied by the District of Columbia in accordance with the pretrial order. Mr. Durbin was the manager of the restaurant in question, whereas Mr. Edwards is the superintendent of the buildings and grounds of all the restaurants owned by Marriott Hot Shoppes, Inc. (Tr. 7-8.)[4] Plaintiff readily admitted that

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[3] Plaintiff states, on page 6 of her brief, that Mr. Kessler "* * * was to be called by the Appellant to testify as to the general knowledge that pebbles are a hazardous condition." If this is so, such intention was not disclosed to the trial court. Furthermore, the value, and even the probativeness, of such testimony is questionable.

[4] Plaintiff attempts now to justify this substitution by representing that Mr. Durbin was out of town (brief, p. 6). No such representation was made to the trial court.

the functions of the two individuals were different (Tr. 8). Again, the purpose in proffering Mr. Edwards was to prove the new unpleaded theory of liability against Marriott Hot Shoppes, Inc. There was no suggestion of any kind that Mr. Edwards would be able to provide any testimony relative to plaintiff's claim against the District of Columbia.

The trial judge was confronted with a situation where the parties were before the court and, with the exception of the plaintiff, ready to proceed to trial. Having previously been frustrated by the pretrial judge in an attempt to have the pretrial order amended to assert a new theory of liability (not set forth in the complaint) against Marriott Hot Shoppes, Inc., plaintiff, at trial, proffered a regulation and two witnesses to prove such a theory. Certainly, under such circumstances, the trial court was justified in refusing to allow the pretrial order to be amended so as to make such proffered evidence relevant. In any event, the exclusion of such evidence could have had no effect, whatsoever, upon plaintiff's ability to proceed with her claim against the District of Columbia or, for that matter, her pleaded claim against Marriott Hot Shoppes, Inc. Upon plaintiff's refusal to proceed with the case in accordance with the issues which were framed, the trial judge was justified in dismissing the matter for want of prosecution. Sheaffer v. Warehouse Employees Union, Local No. 730, ____ U. S.

App. D. C. ____, 408 F. 2d 204 (1969); Giovanetti v. Georgetown University Hospital, 22 F. R. D. 493 (D. D. C., 1958); Shaffer v. Evans, 263 F. 2d 134 (10th Cir., 1958); Rollison v. Washington Nat. Ins. Co., 176 F. 2d 364 (4th Cir., 1949); Walker v. Spencer, 123 F. 2d 347 (10th Cir., 1941), cert. denied, 316 U. S. 692 (1942). Indeed, in view of the lack of diligence on the part of the plaintiff throughout the pendency of the case, any alternative course on the part of the trial judge would, as he stated, have constituted an abuse of discretion. The accident occurred on March 10, 1966, the complaint was filed on June 2, 1966, was dismissed on October 4, 1967, under Rule 13 of the Rules of the District Court,[5] thereafter reinstated and pretried on November 27, 1968, and called for trial on February 4, 1969. The administration of justice would certainly suffer if the courts were to permit a party plaintiff, under such circumstances, to take a voluntary non-suit and later reinstate the cause.

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[5] Rule 13 provides for a dismissal upon the failure, for a period of six months, of a party seeking affirmative relief to comply with all the rules and orders requisite to the prosecution of the claim and getting the case placed on the trial calendar.

## CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment of the court below dismissing the complaint against the District of Columbia is in all respects correct and should, therefore, be affirmed.

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# A D D E N D U M

DISTRICT OF COLUMBIA POLICE REGULATIONS

ARTICLE 4

## OCCUPATION OF PUBLIC SPACE

Section 1. The public parking on streets and avenues of the District of Columbia shall be under the immediate care and keeping of the owners or occupants of the premises abutting thereon, and such owners or occupants, after obtaining a permit from the Superintendent of Permits, may enclose the said parking with walls of an approved type not exceeding 3 feet 6 inches in height; or with wooden fences of colonial design of an approved type not exceeding 3 feet 6 inches in height with square, rectangular, or round posts and rails, with or without square, rectangular or round pickets extending through the rails; or with open fences of an approved type not less than 3 feet nor more than 3 feet 6 inches in height, constructed of iron, ornamental wire, or woven wire, with top and bottom string pieces: Provided, That no permit shall be issued for and it shall be unlawful to maintain a sharp-pointed or spear headed type of fence, the uppermost points or prongs of which are less than one-half inch in diameter. Walls and fences of a height greater than 3 feet 6 inches will be permitted only when specifically approved by the Board of Commissioners of the District of Columbia. For enclosing the parking in front of each house or where no parking fence or wall has previously existed a fee of $1.00 will be charged. Where application is made to repair an existing fence or wall with the same character of material, no fee will be charged: Provided, That a permit for the erection of such fence or wall is of record. Where permission is requested to move a parking fence of approved pattern out to a newly established sidewalk line no fee will be charged. In all cases not covered by these exceptions, however, a fee of $1.00 will be charged. Blocks or pedestals for fence posts must not project above the surface of the sidewalk, and no portion

of said blocks or fences shall extend beyond the parking line. All gates in parking fences must swing inwardly, and no gate shall swing outwardly over any sidewalk, avenue, street, or road.

It shall be unlawful to place or maintain any wickets, guard wires, or other similar devices upon or adjacent to the sidewalk, tree space, or parking in the District of Columbia, except upon the following conditions: The Superintendent of Permits is authorized, upon the payment of a fee of $1 for each premises, to issue a permit to erect wickets of iron not less than three eighths of an inch in diameter, to be driven firmly into the ground, overlapping at least 3 inches, said wickets to be securely lashed with wire at top intersections and at the bottom of the wicket; said wickets to be painted green and to be maintained in exact alignment with their tops on a level. Where the parking around which the wickets are to be placed is at the level of the sidewalk the wickets shall have a minimum height of 24 inches; and where the parking is terraced the wickets shall have a minimum height of 12 inches: Provided, however, That such permission is to be regarded as a license only and may be revoked by the Commissioners upon failure to maintain the wickets in accordance with this regulation, or for any other reason which may be determined by said Commissioners. No permit will be issued for any wickets within one foot of the back edge of the public sidewalk, or in, upon or around tree spaces, and the Commissioners reserve the right to deny the use of wichets at any place they may deem it inadvisable to permit them to be constructed or maintained.

Sec. 1a. The Superintendent of Permits is authorized to issue permits, without fee, to erect tree markers of concrete or stone in tree spaces; provided said markers are not less than 6 inches nor more than 8 inches square; not in excess of 8 inches in height; driven firmly into the ground, and placed as directed by the Director, Department of Highways: Provided further, That no such marker may be placed between a tree and a corner crosswalk. A metal plate, bearing appropriate inscription, if securely fastened, may be placed on the upper surface of each marker.

Sec. 2. No hedges shall be planted on parking except upon permits from the Superintendent of Permits, for which the same fee shall be charged as for parking fences.

Hedges on parkings shall not exceed 3 feet in height nor project more than 6 inches over the sidewalk, and on corner properties, if placed at the back of the sidewalk, must be planted not more than 10 inches above the sidewalk grade.

Sec. 3. No person shall, without the written authority of said Commissioners, change the grade of any parking, or pave or cover any portion thereof, or construct any walls, steps, coping, fences or other structures thereon, and every day such changing of grade, paving, or covering thereof, or said walls, steps, coping, fences, or other structures thereon shall remain or continue, shall constitute and be a separate offense: Provided, That nothing herein contained shall be construed to prevent the person having control of the premises abutting on said parking from sodding such parking or beautifying the same with flowers. Parking division fences on streets and avenues shall follow property lines. Parking leads shall not be over 6 feet in width without the approval of the Engineer Commissioner. Per-

mits to cross sidewalks, except in case of building operations shall be granted by the Superintendent of Permits upon the application of the owner of the abutting property or his authorized representative under conditions similar to those named in the Building Regulations governing occupation or use of public space to guarantee against any injury to the sidewalk, paving, or curbing.

No person shall use any parking for the purpose of drying clothes or other laundry.

No person shall deposit or cause to be deposited on any public sidewalk, tree space, roadway, or alley, any dirt, grass, or other yard refuse, from any public parking under the immediate care and keeping of the owners or occupants of the premises abutting thereon, except leaves from such parking.

Sec. 3a. Permits to pave the public parking in districts zoned for first commercial, second commercial, and industrial uses will be granted by the Superintendent of Permits upon the recommendation of the Director, Department of Highways and upon payment of a fee of $1 for each permit.

Sec. 4. No person shall, without the permission in writing of the Commissioners, pave or cover with any permanent covering the sidewalk space or any portion thereof, or place any letters or advertising device thereon, or in or upon any sidewalk, in any manner whatever, either by projecting images or shadows upon the sidewalk by means of lenses or reflectors, or both, or in any other manner.

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
For The District of Columbia

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No. 22946

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MARGARET WENIT,

Appellant,

v.

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IN
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# BRIEF FOR APPELLANT

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## INDEX

## ARGUMENT

I. THE TRIAL COURT'S EXCLUSION OF WITNESSES' TESTIMONY WAS IMPROPER

In arguing that the trial court properly excluded the testimony of the witnesses for the Appellant, the Appellees cite a long list of cases which support the proposition that the inclusion and/or exclusion of witnesses is within the discretionary power of the trial judge. This proposition, however, is not being challenged by the Appellant. It is the Appellant's contention that the trial judge's actions in this case were outside the realm of discretionary power and did in fact cause manisfest injustice.

It should be emphasized that the witnesses Edwards and Kessler, whose testimony, in whole or in part, was excluded by the trial judge were not being called to testify by the Appellant pertaining to claims of negligence which had been barred by a judge or had not been raised at pretrial. (See Appellee Marriott Hot Shoppes, Inc. Brief, Page 8; Appellee, District of Columbia, Brief, Page 4). The Pretrial Order clearly sets out that the claim of negligence against both Marriott Hot Shoppes, Inc. and District of Columbia was for "maintaining sidewalk or walkways in a hazardous manner" and that both parties "knew or should have known" of this condition. The testimony of these witnesses would have related to the issue of notice - notice of the hazardous conditions. This certainly cannot be construed as irrelevant to the claim set forth in the Pretrial Order.

The Appellant in this case had no desire to continue this case. The two witnesses under discussion were under subpoena and were prepared to testify. The Appellees had been served with notice of witness Edwards on January 31, 1969. Witness Kessler's name had been properly incorporated by reference in "Appellants Statement in Compliance With Pre-Trial Order." Witness Edwards' testimony was merely to relate to the question of notice. There was no tactic of surprise intended in Appellant's actions nor would any such result have occurred if the trial judge had permitted such testimony. Similarly, the question of whether witness' Kessler should or should not have been permitted to testify as an expert was not a matter even remotely considered by the trial judge during the course of argument of this matter. (See Appellee Marriott Hot Shoppes, Inc., et al, Brief Page 12).

II. THE DENIAL OF APPELLANT'S MOTION FOR VOLUNTARY DISMISSAL OF HER ACTION WITHOUT PREJUDICE AND THE TRIAL COURT'S DISMISSAL OF APPELLANT'S ACTION WITH PREJUDICE WAS IMPROPER

The Appellees contend that the trial judge's actions in denying the Appellant's Motion for Voluntary Dismissal and dismissing the case with prejudice were proper in that delay results in prejudice to the parties. (Appellee Marriott Hot Shoppes, Inc. Brief, Page 19). Similarly, the trial judge stated at the hearing of this matter in response to Appellant's Motion to voluntarily non-suit the case:

"THE COURT: You mean you cannot continue under the delays

brought about by the plaintiff, all right, sir." (Tr. 14).

It should be emphasized once again that the Appellant at the time of trial was, in fact, ready to prosecute this matter. Because of the ruling of the trial judge denying the Appellant the right to properly present her case, counsel was placed in a position whereby she had little or no choice as to the avenues in which to proceed. This was not a matter of wanton delay of prosecution. The motion to voluntarily dismiss the matter was merely a response and a proper one, to the erroneous ruling of the trial judge excluding the testimony of Appellant's witnesses as to matters of extreme importance and relevance to Appellant's case. Thus, the dismissal of Appellant's cause of action, . denying this party her just day in court, was clearly in error.

## CONCLUSION

Appellant adopts her original conclusion.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was mailed, postage prepaid, to James A. Hourihan, 815 Connecticut Avenue, Washington, D.C. 20006 and Hubert B. Pair, Esq., District Building, Washington, D. C. on this ~~17th~~ 21 day of November, 1969.

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